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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

JEFFERY A. DUPUIS,

Defendant and Respondent.

A129920

(San Francisco County
Super. Ct. No. 210712-02)

The People appeal from an order of the trial court granting a new trial to defendant Jeffery A. Dupuis because of jury misconduct, contending that jury misconduct was not demonstrated by competent evidence, that the evidence that was submitted was inadmissible, and that even if jury misconduct occurred, Dupuis suffered no prejudice. While the People agree that remand to the trial court for consideration of Dupuis's other ground for requesting a new trial, on which the court did not rule, is appropriate, they request reversal of the grant of a new trial without remand on the issue of jury misconduct. Dupuis agrees that the trial court's grant of a new trial was improper because trial counsel did not present competent evidence of jury misconduct to the court, and requests reversal with remand to the trial court for a hearing on the issue of jury misconduct with competent evidence.

We reverse the trial court's grant of a new trial to Dupuis and remand, leaving how to proceed with the issue of jury misconduct to the discretion of the trial court.

BACKGROUND

In October 2009, police arrested Mathew Solano for evading arrest and possession of marijuana. Solano told police of a blue SUV with attached U-Haul trailer containing about six pounds of marijuana. The police located the vehicle and Dupuis arrived a few minutes later. When the police informed Dupuis that the vehicle was under investigation and may contain a large amount of marijuana, Dupuis confirmed that marijuana was present in the vehicle and that he had a doctor's note recommending the use of marijuana.

Dupuis consented to a police search of his vehicle. In the front passenger area of the vehicle was a backpack that Dupuis identified as belonging to Solano. Inside the backpack were two bags, one in a coffee tin, with a total net weight of 162.5 grams of marijuana. Marijuana was also found in several locations elsewhere in the vehicle, which was registered to Dupuis, and in the U-Haul trailer, which Dupuis had rented. The gross weight of the marijuana found, excluding what was in Solano's backpack, was between 6 and 7 kilograms (i.e., 13.2 to 15.4 pounds).

The People filed an information on November 23, 2009, charging Dupuis with the transportation, sale, and giving away of marijuana, a felony violation of Health and Safety Code section 11360, subdivision (a) (count 1). Dupuis and Solano were both charged with felony possession of marijuana for sale, in violation of Health and Safety Code section 11359, subdivision (a) (count 2). The court subsequently amended count 1 to allege "transportation" only. The cases against Solano and Dupuis were severed.

Dupuis's case went to trial and the jury found him guilty on count 1 but was unable to reach a verdict on count 2. Pursuant to a negotiated disposition, the information was amended to add a misdemeanor violation of possession of more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd (c)) (count 3), to which Dupuis pleaded no contest in exchange for dismissal of count 2.

On April 12, 2010, Dupuis filed a motion to dismiss, or in the alternative, for a new trial. The motion sought dismissal of all charges on the ground that the People had failed to disclose exculpatory evidence regarding the San Francisco Police Department Crime Lab. The motion sought a new trial on count 1 on the ground that the guilty

verdict was inconsistent with the law or evidence and on the ground of jury misconduct. Dupuis also moved to withdraw his guilty plea to count 3.

The allegation of jury misconduct asserted that the jurors had failed to follow the court's instructions. This allegation was based on conversations with jurors after they returned their verdict and was supported by declarations, summarizing those conversations, from a defense attorney and a defense investigator. No juror affidavits were submitted.

The People opposed Dupuis's motion. As to the allegation of jury misconduct, the People argued, as they do here, that because no juror affidavits were submitted, there was no competent evidence of jury misconduct.

A hearing on the motion for a new trial was held on September 17, 2010,¹ and the court announced a tentative decision to grant the motion based on jury misconduct. The People stated that the declarations provided in support of the allegation of jury misconduct were "not competent evidence for the judge—for the court to grant this motion. It's not—I think it is an inartful way to probe behind the thinking of the jurors and their deliberations. There's no declarations from any of the jurors. And it's basically kind of an informal discussion that doesn't really amount to competent evidence." Following this, the court stated that it was "especially concerned about the particular issue as to whether or not this is competent evidence on which the court should base—could base a ruling of jury misconduct."

Dupuis's counsel then responded: "I believe that the evidence is competent. As stated in both declarations, the Assistant District Attorney was present during the conversations with the jurors. She heard what the two declarants heard herself. There

¹ The court began the hearing with the announcement that "[T]here are three pending matters. Two of them the court has directed me to send back to the Hall of Justice should they be pending after this hearing. Those would be the motion to dismiss and the motion to withdraw the guilty plea. However, the motion to grant a new trial is properly before me, as the trial court judge." Thus, the trial court considered only the new trial motion and the disposition of the other matters is not in the record or in dispute here.

was nothing in her papers that refuted that. So I would ask the court to construe that—you know, that the declarations are unrefuted.” The People repeated their contention that the declarations were not competent evidence for the grant of a new trial.

The court addressed Dupuis’s counsel: “[Y]ou’ve offered a declaration in support of this motion. And under penalty of perjury do you affirm your belief that, if required to, you would be able to obtain declarations from the two jurors consistent with your offer in your declaration?” Dupuis’s counsel affirmed that she would be able to do so. The court then stated: “All right. I am going to overrule the objections of the People. [¶] I think that the exercise of getting the declarations to supplement this would—if I had doubts about the veracity of the declaration[s] . . . I would be of a different mind, but I have no doubts about the veracity of the declarations and accept them. And therefore, I do grant the motion for a new trial.”

The People timely filed their notice of appeal on October 1, 2010.

DISCUSSION

A trial court may grant a new trial when the jury has “been guilty of any misconduct by which a fair and due consideration of the case has been prevented.” (Pen. Code, § 1181, case (3).) When ruling on a motion for a new trial on the ground of jury misconduct, a court undertakes a three-step inquiry. (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 703 (*Dorsey*).) First, the court determines whether the affidavits supporting the motion are admissible. (*Ibid.*, citing Evid. Code, § 1150.) Next, if the evidence is admissible, the court determines whether the facts establish misconduct. (*Dorsey*, at p. 703.) Finally, if misconduct is established, the court determines whether the conduct was prejudicial. (*Id.* at pp. 703-704.) “A trial court has broad discretion in ruling on each of these issues, and its rulings will not be disturbed absent a clear abuse of discretion.” (*Id.* at p. 704.)

Evidence Code section 1150, subdivision (a) provides: “Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is

admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.” “It is settled . . . that ‘a jury verdict may not be impeached by hearsay affidavits.’ ” (*People v. Williams* (1988) 45 Cal.3d 1268, 1318 [finding no abuse of discretion when the trial court denied a motion for a new trial because of jury misconduct when the sole evidence was the declaration of a defense investigator that related a conversation with a juror], abrogated on another ground by *People v. Guivan* (1998) 18 Cal.4th 558, 560-561.) The trial court has the discretion to conduct an evidentiary hearing to resolve a claim of juror misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) However, “ordinarily a trial court does not abuse its discretion in declining to conduct an evidentiary hearing on the issue of juror misconduct when the evidence proffered in support constitutes hearsay.” (*Id.* at p. 810.)

Here, Dupuis supported his claim of juror misconduct with two declarations reporting the content of conversations with jurors. This was hearsay evidence purporting to demonstrate misconduct and was not competent evidence upon which the trial court could grant a motion for a new trial. Both Dupuis and the People agree that the trial court’s grant of a new trial must be reversed; and they are correct because the court abused its discretion by granting a new trial based on the hearsay declarations of defense counsel and a defense investigator.

Where Dupuis and the People differ is in the direction we should provide the trial court on remand, which is required, in any case, for consideration of Dupuis’s alternate ground for requesting a new trial, which the trial court did not address. The People seek reversal of the grant of a new trial with remand limited only to Dupuis’s alternate ground for the new trial. Dupuis seeks remand “for a complete hearing with competent evidence” on the issue of jury misconduct.

Dupuis proposes that “[w]here a court renders a decision on the merits of a juror misconduct claim based on incompetent evidence, the case must be remanded to the trial court for a full hearing with competent evidence.” However, neither of the two cases cited by Dupuis in support of this proposition establishes such a rule.

In *People v. Bryant* (2011) 191 Cal.App.4th 1457 (*Bryant*), Bryant's motion for a new trial on the ground of jury misconduct was supported by the unsworn statement of one juror. (*Id.* at p. 1463.) The prosecution's opposition relied on unsworn statements made by all 12 jurors to a district attorney investigator, whose reports were also unsworn. (*Id.* at p. 1464.) "Deeming the absence of sworn statements from jurors a 'procedural defect,' the court asked if counsel would 'waive those defects' and allow the court to proceed on the documents submitted. . . . Both parties agreed to the court's suggestion and waived any objection to the defects in the juror statements." (*Id.* at p. 1466.) Although the court found that two instances of misconduct had occurred, it also determined that there was no likelihood of prejudice and denied the motion for a new trial. (*Ibid.*)

The appellate court determined that "there was no admissible evidence of jury misconduct presented to the trial court. While parties may, in general, waive evidentiary objections to documents, we hold it is not permissible to treat unsworn statements of 12 jurors as though they had been made under penalty of perjury in order to attack a jury verdict for misconduct." (*Bryant, supra*, 191 Cal.App.4th at p. 1470.) That court held that "[b]ecause the parties waived any objection to the unsworn statements at the suggestion of the trial court, the appropriate remedy is to return the matter to the trial court for a full and complete hearing with competent evidence." (*Id.* at p. 1471.) In contrast to *Bryant*, the People here did not waive their objection to the hearsay statements submitted by Dupuis.

In *People v. Perez* (1992) 4 Cal.App.4th 893 (*Perez*), Perez moved for funding to investigate possible jury misconduct, supported by the hearsay statement of one juror that the jury had discussed the fact that Perez had not testified. (*Id.* at p. 905.) In considering this motion, the trial court stated: " '[I] do not stand on the proposition that there's no declaration. I assume to be true the allegations that [the juror] has made not under oath.' " (*Ibid.*) "The court then assumed counsel was also seeking a new trial so that the denial of that motion would also be on the record. When defense counsel balked at making an oral motion without other evidence which would be obtained in an

investigation,” the court stated: “ ‘I will assume for the sake of argument that all 12 jurors would say that that discussion [regarding Perez’s failure to testify at trial] took place.’ ” (*Id.* at pp. 905-906.) Defense counsel then made an oral motion for a new trial, which the trial court denied. (*Id.* at p. 906.)

The appellate court found that “discretion was abused here, where the court denied the motion on a factual scenario presumptively establishing prejudicial jury misconduct.” (*Perez, supra*, 4 Cal.App.4th at pp. 908-909.) That court went on to state: “Our conclusion the court prejudicially erred in denying the new trial motion requires that we vacate the judgment and remand for further proceedings. On remand we wish to emphasize the trial court should not assume 12 jurors actually discussed Perez’s failure to testify. Although we appreciate a substantial period of time has expired since the jury in this case was discharged and obtaining declarations from some or all of the jurors may be difficult or impossible, we do not believe the court’s earlier error relieving defense counsel of this burden should result in any other procedure than that required by law.” (*Id.* at p. 909.) As in *Bryant*, the trial court in *Perez* invited its own error—it actually enticed defense counsel to move for a new trial with only the hearsay statement of one juror before it. Here, in contrast, Dupuis’s motion for a new trial, supported by incompetent evidence, was not made at the invitation of the trial court.

Dupuis also argues that “remand for a full and complete hearing with competent evidence is required to ensure respondent’s right to effective assistance of counsel under the Sixth Amendment. Here, when the trial court asked trial counsel whether the court could base its ruling of misconduct on [the hearsay affidavits submitted], counsel stated such evidence was competent. As already discussed, this was plainly incorrect. [Citation.] As such, reversal without remand would be manifestly unjust to respondent and likely involve future habeas claims anyway.” Dupuis cites no authority supporting this argument and we reject it out of hand. Dupuis’s representation at trial was either competent or incompetent, and is not rendered one or the other by the trial court’s determinations or ours. The argument Dupuis actually makes is that we must rule in such a way that the alleged incompetence of trial counsel is not rendered prejudicial. If courts

gave consideration to such an argument, they would actually invite incompetent representation.

Dupuis has failed to make a convincing argument that on remand we must direct the trial court to provide him a hearing on his allegation of jury misconduct after he has had a chance to present competent evidence.

The People, on the other hand, first propose that Dupuis forfeited his right to present competent evidence of juror misconduct when the People “repeatedly objected” to his failure to do so. No authority is cited for this proposition, which is belied by the fact that, had the court not erred by granting a new trial without competent evidence of jury misconduct, it nevertheless, despite the People’s objection, had the discretion to schedule an evidentiary hearing at which it would consider competent evidence presented by the parties.

The People also argue that the statements contained in the hearsay declarations, even if contained in actual juror declarations, would be inadmissible under Evidence Code section 1150 as reflecting their subjective reasoning processes. However, under *Perez*, it would be error for us to make assumptions about the content of competent evidence based on the content of incompetent evidence. It may well be that juror declarations could contain material that is admissible under Evidence Code section 1150.

The People have failed to make a convincing argument that on remand we must remove Dupuis’s allegation of jury misconduct from the trial court’s consideration.

Absent the trial court’s error, it would not have abused its discretion by denying Dupuis’s motion for a new trial on the ground of jury misconduct, because it was supported only by hearsay evidence. Likewise, particularly because the content of the hearsay declarations was undisputed by the People, the trial court would not have abused its discretion by scheduling an evidentiary hearing on the matter, at which the parties would have to proffer competent evidence. We find no reason to limit the trial court’s discretion on remand. It may take any of the actions on remand that were legitimately available to it at the time of the original hearing.

DISPOSITION

The trial court's order granting a new trial to Dupuis is reversed. The motion for a new trial is remanded for further proceedings consistent with this opinion.

Lambden, J.

We concur:

Kline, P.J.

Haerle, J.